PREME COURT U.S.
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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. 313

DONALD KALISH,

Petitioner,

vs.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth District.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth District.

Petitioner hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The opinion of the Court of Appeals [Tr. Vol. 1, portion added by Court of Appeals] is included herein, at pages 8-9 of the appendix, *infra.* It is not yet reported. The complaint, defendant's motion to dismiss the complaint, and the order of dismissal of the complaint with prejudice [Tr. Vol. 1, pp. 2-6, 8, 37-8], are also shown in the appendix, *infra,* at pp. 1-7 thereof.

Jurisdiction.

The judgment of the Court of Appeals was entered April 23, 1969 (App. p. 8). The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

Questions Presented.

Preliminary Statement.

This case involves a claim by petitioner for refund of federal excise tax on telephone service. Petitioner based his claim for refund on the contention that the act imposing the amount for which refund was sought by him was invalid, and that the reason the act was invalid was that the revenue to be raised by it was intended, in the enactment of the act, solely for a purpose violative of the Constitution. The judgment sought by petitioner was solely one for refund of the sum paid by him.

The court below did not reach the constitutional issues and expressly said so. It decided only that petitioner did not have the required standing to sue. Also, although nothing on the face of the statute, as the court below found, revealed the purpose for which the revenue to be raised by the act was intended, the court declined to go outside the face of the act to determine that purpose. It did this, it appears, in connection with the question of standing to sue, in order to show what it believed to be an absence of required nexus between petitioner's status and a limitation under the Constitution.

Question Presented.

For the purpose of this petition we limit ourselves to the question decided by the court below, that is, as above shown, whether petitioner did or did not have the required standing to sue. We think it an unnecessary burden on this Court to consider at this point questions presented to the court below but which it expressly held it did not reach. The cause could be remanded to

that court for consideration of those questions. *Peoria Tribe of Oklahoma v. U.S.*, 390 U.S. 468, 473, 88A S. Ct. 1137, 1139.

Statutes Involved.

The relevant jurisdiction of the District Court is contained in 28 U.S.C. §1346(a)(1). The provision governing procedure on a suit for refund of federal taxes, to the extent relevant here, is I.R.C. 1954, §§7422(a), (b). The act imposing the tax involved is Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38. We do not quote those provisions, however, because no question as to their wording or meaning is presented by this proceeding.

Statement.

Necessarily this statement repeats in part the Preliminary Statement under the heading of Questions Presented.

The suit here is for refund of federal excise tax on telephone service. Petitioner filed the required claim for refund. Respondent denied the claim. The filing of this suit in the District Court followed.

Respondent did not file an answer but instead a motion for dismissal on the following grounds:

1. That petitioner lacked standing to sue;
2. That the court lacked jurisdiction because the issue was a political one; and
3. That the complaint failed to set forth a claim upon which relief could be granted.

The District Court, reciting the grounds of the motion as above, granted it (App. p. 7). Appeal to the court below followed. That court affirmed, on the basis

solely of the first ground above stated, lack of standing to sue.

The complaint (App. pp. 1-5) alleged that appellant paid the sum of $6.15 as federal excise tax on telephone service for the month of August 1967; and that of that amount the sum herein sued for, $4.92, represented the additional amount of such tax imposed under the Tax Adjustment Act of 1966. The complaint further alleged that the additional amount so imposed was imposed, as stated in the claim for refund, for the sole purpose of providing funds for the war in Vietnam; and that the use of the funds so intended was, as also stated in the claim for refund, in violation of the Constitution of the United States. The complaint also, under paragraph X thereof, alleged several facts as reasons why such use of the funds to be raised by the tax was in violation of the Constitution of the United States.

In general, as presented to the court below, those facts involve several constitutional limitations on the power of Congress, including the separation of powers, the law of nations, and the First Amendment. But we omit them here because of the limitation of the Questions Presented to the one question of standing to sue.

Reasons for Granting the Writ.

1. The decision below is contrary to the decision of this Court on which it chiefly relies, *Flast v. Cohen*, 392 U.S. 83. As observed in *Flast*, at pages 99-100:

> ". . . when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

In that case this Court had before it not a suit for refund of tax paid but a proceeding to enjoin certain spending of government monies. A suit for refund of tax paid, however, is expressly authorized by statute. And who else but the person who paid the tax could bring such a suit?

Indeed, even in a dissent in *Flast,* disputing the standing to sue found by the majority there, the dissenting justice nevertheless conceded, at page 117:

> "It could hardly be disputed that federal taxpayers may, as taxpayers, contest the constitutionality of tax obligations imposed severally upon them by federal statute. . . . Moreover, such a challenge may provide the basis of an action by a taxpayer to obtain the refund of a previous tax payment. See, e.g., Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817."

In *Bailey* the taxpayer, as indicated, paid the tax, filed claim for refund, and on its rejection brought suit.

Clearly, the decision below is not only not supported by *Flast,* but is in conflict with it and the other cases cited above.

2. The decision below is in conflict with another decision of this Court on which it attempts to rely, *United States v. O'Brien,* 391 U.S. 367.

As stated by this Court in *Cincinnati Soap Co. v. U.S.,* 301 U.S. 308, 312-313, a tax is invalid if the purpose of the tax is not within the power of Congress under the Constitution; and as stated in *A. Magnano v. Hamilton,* 292 U.S. 40, 43, the requirement as to purpose "has regard to the use which is to be made of the revenue derived from the tax, and not to any ulterior

motive or purpose which may have influenced the legislature in passing the act."

Here, in order to show the purpose of the tax—its *sole* purpose—petitioner relied below entirely on the House and Senate committee reports which presented the bill for the tax to Congress. This was the only possible method of showing its purpose since, as the Court below conceded, nothing on the face of the act revealed it. And this is exactly what this Court did to show the purpose of the act in *United States v. O'Brien, supra,* at pages 385-6. Indeed, this Court there included in its opinion, as an appendix, the entire portions of the Senate and House committee reports explaining the section of the act there involved. Here petitioner in presenting the case to the court below did precisely the same thing. The portion of the reports so presented there are included in the appendix herein, pages 10-11.

Thus, the decision below is not only not supported by *United States v. O'Brien, supra;* it is directly in conflict with it.

3. The importance of the issue is of the greatest. It begs the question of standing to sue to inject it into a suit of a person, solely for refund of taxes imposed upon him, and paid by him, where precisely such suit by such person is expressly authorized by statute. The decision below will cause no end of confusion in tax litigation. It must not be allowed to stand.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

APPENDIX.

Complaint in Suit for Refund of Federal Excise Taxes.

United States District Court, Central District of California.

Donald Kalish, Plaintiff, vs. United States, Defendant. No. 68-128-F.

Filed: Jan. 26, 1968.

Plaintiff brings this suit under Judicial Code, 28 U.S.C. §1346, for refund of federal excise taxes, together with interest on the amount paid as allowed by law, and alleges as follows:

I

Plaintiff is an individual residing at 15142 Mulholland Drive, Los Angeles, California 90024, and his social security number is 491-14-8069.

II

On September 14, 1967, plaintiff paid to General Telephone Company as collecting agency, pursuant to a bill of that agency dated September 10, 1967, the sum of $6.15 as federal excise tax on telephone service for the month of August 1967; and on September 20, 1967, the said collecting agency paid over the said sum to defendant.

III

No refund of said amount, in whole or in part, has been made by the said collecting agency to plaintiff; nor has plaintiff consented to allowance of refund of said amount, in whole or in part, to that agency.

IV

Of said sum of $6.15, the amount of $4.92 was specified, pursuant to a letter enclosed by plaintiff with the payment, as covering the sum herein sued for.

V

On September 21, 1967, plaintiff filed with defendant claim for refund of said sum of $4.92, stating the grounds of his claim as follows:

> "Of the amount of tax paid, $6.15, $1.23 constitutes the amount payable under P. L. 89-44, the Excise Tax Reduction Act of 1965. The balance, $4.92, constitutes the additional amount imposed under P. L. 89-368, the Tax Adjustment Act of 1966. That additional amount is the amount herein claimed.
>
> "Under P. L. 89-44, the rate of tax for the period herein involved would have been 2%; by P. L. 368 an earlier 10% rate was reinstated. As expressly shown by the House and Senate committee reports, U. S. Code Congressional and Administrative News, 89th Congress, Second Session, Vol. 2 (Legislative History), pages 1933, 1935, 1937, 1938, 1963, 1964, 1985, 1990, 2010, 2011, the sole purpose of the reinstatement of the 10% tax rate was to provide funds for the war in Vietnam. As there clearly and expressly shown, if that war were not in process none of the funds provided by P. L. 89-368 would be necessary.
>
> "It is my view that the action of the Government in carrying on the said war is in violation of the Constitution of the United States. I take the posi-

tion, therefore, that the excise tax on telephone service, to the extent of the 8% added by P. L. 89-368, is completely void."

VI

On January 18, 1968, the United States Treasury Department, by its Internal Revenue Service Center, Western Region, 1160 West 1200 South, Ogden, Utah 84405, issued to plaintiff a letter denying said claim, said letter bearing as reference symbols the following: "53212: :vs."

VII

The said letter stated as the grounds for denying said claim the following:

"The authority of the Internal Revenue Service to make credits or refunds, as set forth in Section 6402 of the Internal Revenue Code of 1954, is limited to overpayments of taxes. There is no provision of law under which the Service is authorized to make refunds based on the grounds set forth in your claim."

VIII

The additional tax of which the sum of $4.92 herein claimed was a part was imposed, as stated in the said claim for refund thereof, for the sole purpose of providing funds for the war in Vietnam.

IX

The action of the Government in carrying on the said war is, as stated in the said claim for refund, in violation of the Constitution of the United States.

X

Among the reasons why the action of the Government in carrying on the said war is in violation of the Constitution of the United States, plaintiff cites and alleges the following:

(a) The purpose of said war is not, and never was, the common defense or general welfare of the United States, but the defense of private enterprise, and the profit, growth and expansion thereof, within the United States and everywhere else on this planet, against the barrier and progress in foreign nations, wherever they may be, of a political and economic system and ideology foreign to and restrictive of private enterprise.

(b) The said war was never declared by Congress, as the Constitution requires, and it could not have been declared by Congress, because Congress, in view, among other factors, of the said purpose of said war, could not have identified, and never did identify, in the origin of said war or later, the nation or nations against which it was to be carried on.

(c) There never was an attack upon the United States or any of its facilities by any of the areas or people against which the said war is being carried on.

(d) The said war is in conflict with the United Nations Charter, the so-called SEATO Treaty, and other treaty obligations of the United States.

(e) The acts by American forces in said war include the use of devices and methods, such as, among others, napalm and fragmentation bombs, of such a degree of obscene cruelty and brutality, against not only armed forces but unarmed civilians, and against not only

adults but children and even infants, that they violate the law of war included in the law of nations recognized by the Constitution.

XI

The facts alleged in paragraph X above are of such common knowledge as to be within the scope of judicial notice.

WHEREFORE, plaintiff prays for judgment in his favor as follows: refund of tax in the amount of $4.92, plus interest thereon as allowed by law, together with his costs and disbursements herein.

/s/ George T. Altman
George T. Altman
Attorney for Plaintiff

Defendant's Motion to Dismiss Complaint.

In the United States District Court for the Central District of California.

Donald Kalish, Plaintiff, v. United States, Defendant. Civ. No. 68-128-F.

Comes now the defendant, UNITED STATES OF AMERICA, and moves to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted, for the reasons set forth in the defendant's memorandum of points and authorities attached hereto.

WM. MATTHEW BYRNE, JR.
United States Attorney

LOYAL E. KEIR
Assistant United States Attorney
Chief, Tax Division

By: /s/ Loyal E. Keir

Order of Dismissal of Complaint With Prejudice.

United States District Court, Central District of California.

Donald Kalish, Plaintiff, v. United States of America, Defendant. No. 68-128-F Civil.

Lodged: April 23, 1968.

Filed: April 24, 1968.

Entered: April 24, 1968.

The United States of America, defendant herein, having filed a motion to dismiss the complaint in the above-entitled proceeding on the three-fold grounds that: (1) Plaintiff has no standing to sue, (2) this Court lacks jurisdiction to determine the issue raised by the complaint since the issue is a political one, and (3) the complaint does not set forth a claim upon which relief can be granted; and

The said motion having come on for hearing before this Court on April 22, 1968, at Los Angeles, California; and

The Court having examined the memoranda filed by the parties, heard arguments of counsel, and otherwise considered the matter;

IT IS HEREBY ORDERED THAT:

The defendant's motion to dismiss the complaint is granted, and the complaint is hereby dismissed with prejudice, each party to bear its own costs.

DATED: April 24, 1968.

Warren J. Ferguson
United States District Judge

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Donald Kalish, Appellant, vs. United States of America, Appellee. No. 22,886.

[April 23, 1969]

Appeal from the United States District Court for the Central District of California.

Before: Barnes and Hufstedler, Circuit Judges, and Solomon,* District Judge.

PER CURIAM:

We affirm the action of the district court in granting appellee's motion to dismiss.

This case involves a claim for refund of Federal Excise Tax in the amount of $4.92 paid by the appellant for telephone service, because he claims that the taxing statute (Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38, 66, § 202(a)) is unconstitutional in that Congress was motivated to enact the statute to raise funds for use in the Vietnamese war effort. From that platform appellant launches an attack on the constitutionality of the Vietnam war. We do not reach the constitutional questions, because appellant cannot thus raise them. (*Cf. Flast v. Cohen*, 392 U.S. 83 (1968).) He has established the first nexus required (a taxpayer attacking a federal spending program) but not the second required nexus, because there was no allegation that

*Hon. Gus J. Solomon, Chief Judge, United States District Court, Portland, Oregon, sitting by designation.

Congress, in enacting the Tax Adjustment Act of 1966, "had breached a specific limitation upon its taxing and spending power." *Id.* at 104-105. Hence, appellant had no standing to sue.

Nothing on the face of the statute states the purpose for which the revenue will be used. It is merely a general excise tax statute. We will not probe the legislative history to unearth a claimed improper motive in the enactment of a statute to overturn an otherwise valid statute. (*United States v. O'Brien, supra.*) *See also: Luftig v. McNamara,* 373 F.2d 664 (D.C. Cir. 1967); *United States v. Hogans,* 369 F. 2d 359, 360 (2d Cir. 1966).

Excerpts From Reports of House and Senate Committees, 89th Congress, 2nd Session, 1966, on H.R. 12752, Which Became Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38, Being Excerpts Quoted From U.S. Code Congressional and Administrative News for That Session, pp. 1937-38 (House) and 1990 (Senate).

(The Two Reports Are Identical Except for Typographical Changes Made by the Senate, Which Appear Below in Italics, Any House Wording Replaced or Omitted Appearing in Brackets).

The tax adjustment bill of 1966 will help provide the additional revenues which your committee is advised will be required by the conflict in Vietnam. This bill is designed to help finance the additional expenditures required for this purpose without generating serious inflationary pressures in the domestic economy. The additional revenues will be derived from two general types of provisions. The first consists of improvements in tax collection procedures which, without affecting tax liabilities, involve a temporary increase in the amount of revenues by making payments more current. The remaining provisions restore *excise* rates in effect on December 31, 1965, and impose a 2-year moratorium on presently scheduled reductions in the excise taxes on passenger automobiles and telephone service.

Were it not for special Vietnam costs, [administration testimony before your committee has informed us,] *your committee has been informed* the increase in Federal revenue attributable to the growth of the economy —growth largely in response to the tax reductions enacted in recent years—would be sufficient not only to meet the regular requirements of Federal operations but also to provide a surplus. The President's budget mes-

sage indicates that special Vietnam expenses will account for an estimated $10.5 billion of administrative budget expenditures for the fiscal year 1967. These expenses account for $5.8 billion of the $6.4 billion increase in expenditures in the fiscal year 1967 over those for the fiscal year 1966. It is estimated that revenues would increase by [$7.5] *$7.3* billion between the 2 fiscal years if no change were made in existing tax laws, an amount that would be sufficient to produce a substantial budget surplus were it not for the extraordinary defense requirements. It will be recalled that when the [House] *Senate* was considering [what became] the Revenue Act of 1964—which provided a reduction of $11.5 billion, the largest reduction ever provided—the then Secretary of the Treasury Douglas Dillon indicated that despite this reduction, it might be possible to balance the budget in the fiscal year 1967. It should be noted that this objective of a balanced budget in the fiscal year 1967 would be obtained were it not for the extraordinary defense expenditures arising from the conflict in Vietnam. Thus, were it not for the special Vietnam expenses of $10.5 billion, there would be no need at this time for the 2-year excise tax reduction moratorium or for an advancement of the corporate tax payments at a more rapid rate than originally planned.

SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

DONALD KALISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

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DONALD KALISH, PETITIONER

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are adequately set forth in the petition.

QUESTION PRESENTED

Whether petitioner is entitled to a refund of federal excise taxes paid on telephone service, on the ground that the taxing statute is invalid because the revenue collected under it might be appropriated by Congress to carry on an allegedly unconstitutional "war in Vietnam."

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4251 [as amended by Sec. 302 of the Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136, 145, and Sec. 202(a) of the Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38, 66].

IMPOSITION OF TAX.

(a) *In General.*—

(1) Except as provided in subsection (b), there is hereby imposed on amounts paid for the following communication services a tax equal to the percent of the amount so paid specified in paragraph (2):

Local telephone service.
Toll telephone service.
Teletypewriter exchange service.

The taxes imposed by this section shall be paid by the person paying for the services.

(2) The rate of tax referred to in paragraph (1) is as follows:

Amounts paid pursuant to bills first rendered—

	Percent [1]
Before April 1, 1968	10
After March 31, 1968, and before January 1, 1969	1

[1] Prior to the enactment of Section 202(a) of the Tax Adjustment Act of 1966, Section 4251 provided for the following rates:

During 1966	3 percent
During 1967	2 percent
During 1968	1 percent

(b) *Termination of Tax.*—The tax imposed by subsection (a) shall not apply to amounts paid pursuant to bills first rendered on or after January 1, 1969.

(c) *Special Rule.*—For purposes of subsection (a), in the case of communications services rendered before February 1, 1968, for which a bill has not been rendered before April 1, 1968, a bill shall be treated as having been first rendered on March 31, 1968. For purposes of subsections (a) and (b), in the case of communications services rendered after January 31, 1968, and before November 1, 1968, for which a bill has not been rendered before January 1, 1969, a bill shall be treated as having been first rendered on December 31, 1968.

[26 U.S.C. (Supp. II) 4251.]

STATEMENT

The facts are fully set forth in the complaint filed in the District Court for the Central District of California (Pet. App. 1-5); in summary, they are as follows:

On September 14, 1967, petitioner paid to General Telephone Company, as collecting agency, the sum of $6.15 in federal excise taxes on telephone service for August 1967, and on September 20, 1967, General Telephone paid the tax over to the United States. (Pet. App. 1.) On September 21, 1967, petitioner filed a claim for refund in the amount of $4.92, alleging that such amount represented the taxes imposed under Section 202(a) of the Tax Adjustment Act of 1966, which postponed a rate reduction from

the 10 percent rate for excise taxes on telephone service. Petitioner claimed that the proper rate was 2 percent, alleging that the statute postponing the rate reduction was unconstitutional because it imposed a tax for "the sole purpose" of providing "funds for the war in Vietnam" and the "action of the Government in carrying on the said war is in violation of the Constitution of the United States." (Pet. App. 2.) On January 18, 1968, petitioner's refund claim was denied. (Pet. App. 3.)

Petitioner thereupon filed a complaint (Pet. App. 1-5) in the district court for a refund, alleging the same grounds as in his refund claim. Upon motion by the United States, the district court dismissed the complaint. (Pet. App. 7.) The Court of Appeals for the Ninth Circuit affirmed *per curiam* the action of the district court. (Pet. App. 8-9.)

ARGUMENT

The decision below was correct, and there is no conflict of decisions or other reason for review by this Court.

1. Petitioner, using the vehicle of a tax refund suit, is attempting to obtain a judicial inquiry into the propriety of the American involvement in Vietnam. In affirming *per curiam* the action of the district court dismissing the complaint, the court of appeals held (Pet. App. 9) that petitioner failed to state a claim upon which relief could be granted because the challenged excise tax statute was plainly valid on its face. As the courts below correctly rec-

ognized, petitioner's assertion (Pet. 5-6) that the "sole purpose" of the excise tax rate legislation was to defray costs in connection with the Vietnam effort is simply not borne out by the terms of the statute. Indeed, nothing whatever in Section 202(a) of the Tax Adjustment Act of 1966 binds Congress to appropriate the revenue in any particular manner. The funds derived from the tax are not held in any special fund, nor are they even traceable to or linked with any expenditure previously made or to be made. The statute therefore is no different from numerous provisions imposing excise, income, or other taxes. In alleging that the revenue raised under the statute was intended to defray costs relating to Vietnam, petitioner (Pet. 6) relies upon statements made in Congress which do not appear on the face of the legislation. This Court explicitly ruled in *United States* v. *O'Brien*, 391 U.S. 367, however, that otherwise valid legislation cannot be held unconstitutional because of such statements. There the Court invoked (391 U.S. at 383) the—

> familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. * * * [Quotation omitted.] This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California*, 283 U.S. 423, 455 (1931).

Plainly, the Tax Adjustment Act of 1966 is not unconstitutional on its face and does not have any in-

evitable effect that would render it unconstitutional.[2] Accordingly, the courts below correctly held that petitioner failed to state a proper claim for relief.

2. As the citations at the conclusion of the court of appeals' opinion demonstrate, the basic question presented by petitioner—the legality of the American involvement in Vietnam—is a nonjusticiable political question. Petitioner is asking for judicial intervention in the Executive's conduct of foreign policy. But the final judgment and discretion in those matters are wholly confided to the Congress and the President by the Constitution, Article I, Section 8, and Article II, Sections 2 and 3, and cannot be considered by the courts. See, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111; *Luftig* v. *McNamara*, 373 F. 2d 664, 665-666 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A. D.C.),

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[2] Petitioner's contention (Pet. 5-6) that the decision below is in conflict with *United States* v. *O'Brien*, *supra*, is therefore without merit. The fact that this Court included certain congressional committee reports as an appendix to its opinion does not diminish the thrust of its holding that otherwise valid legislation will not be voided on account of particular congressional motives. Moreover, neither *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, nor *Magnano Co.* v. *Hamilton*, 292 U.S. 40 (Pet. 5-6), support petitioner's contention. In *Cincinnati Soap Co.*, the Court did consider the use to be made of the revenue in connection with the validity of the tax, but there the statute expressly provided for a particular expenditure of the amounts collected. And in *Magnano Co.*, the Court observed (292 U.S., at 43) that the standard of "public purpose", applicable to state taxes, will not be deemed to have been disregarded because the legislature may have had an ulterior purpose in addition to the raising of revenue.

certiorari denied, 389 U.S. 934; *United States* v. *Hogans*, 369 F. 2d 359, 360 (C.A. 2);[3] *Farmer* v. *Rountree*, 252 F. 2d 490 (C.A. 6), certiorari denied, 357 U.S. 906. As this Court said in *Johnson* v. *Eisentrager*, 339 U.S. 763, 789—

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * *

See, also *Baker* v. *Carr*, 369 U.S. 186, 217, and *Powell* v. *McCormack*, decided June 16, 1969, No. 138, O.T., 1968, slip op. 30-31.

3. Apart from the facts that the instant case presents a non-justiciable political question, and that the complaint does not state a claim upon which relief could be granted, petitioner, as the court of appeals alternatively held (Pet. App. 8-9), was without the requisite standing to sue. We agree with petitioner's contention (Pet. 5) that he, as a taxpayer, has standing to recover a refund of taxes that he has paid. It is apparent, however, that this suit, nominally for a tax refund, is in substance a challenge to a federal expenditure of taxes collected. In *Flast* v. *Cohen*, 392 U.S. 83, 102, this Court stated that "in ruling on

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[3] In *Luftig* and *Mora*, the District of Columbia Circuit flatly rejected the notion that it might properly consider the validity of American actions in Vietnam in the context of a suit to enjoin officials from sending a member of the armed forces to Vietnam. The *Hogans* case involved a violation of the draft law.

standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Thus, the Court concluded (392 U.S., pp. 102-103) that a federal taxpayer will not have standing to challenge a federal expenditure unless he can—

> show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. * * *

An examination of petitioner's complaint (Pet. App. 1-5) demonstrates beyond question that, as in *Massachusetts* v. *Mellon*, 262 U.S. 447, there was no allegation that Congress, in enacting the Tax Adjustment Act of 1966, "had breached a specific limitation upon its taxing and spending power." *Flast* v. *Cohen*, *supra*, pp. 104-105. To the contrary, the gravamen of petitioner's complaint is that federal funds are to be spent for an unlawful purpose in that such expenditures will exceed the powers of Congress under Article I, Section 8 of the Constitution. Accordingly, petitioner does not meet the standards enunciated by this Court in *Flast* v. *Cohen*, *supra*, for he has not alleged the violation of any specific constitutional limitation on the taxing power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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October Term, 1969
No. 313

DONALD KALISH,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari.

REPLY BRIEF OF PETITIONER.

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Petitioner replies to the brief of respondent as follows:

1. Respondent, towards the close of his brief, directly concedes the sole contention made in the petition, that petitioner "has standing to recover a refund of taxes that he has paid" (Br. 7). The petition was limited to that issue of standing because the court below reached solely—not "alternatively" (Br. 7)—that issue.

It may be true, as respondent shows by quotations from *Flast v. Cohen*, 392 U.S. 83, 102-103 (Br. 7-8), that in a suit to enjoin governmental expenditures standing may not be established without an examination of the substantive issues; but that cannot apply in a suit for refund where standing is already established by payment of the specific tax involved and claim for refund. In such case, as *Flast* itself shows, by the state-

ment quoted therefrom in the petition (p. 4), the justiciability of the substantive issues, here the grounds for the claim, is necessarily separate. The decision below is, therefore, in direct conflict with *Flast*. Except for his admission of standing, quoted above, what respondent does in his entire brief is only an attempt to confuse this court by an attack upon the constitutional points which the court below expressly held it did not reach.

2. Again, by a footnote (Br. 6), respondent attempts to sweep aside the conflict of the decision below with *United States v. O'Brien*, 391 U.S. 367. In that case this court, at p. 384, held that it would not "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it," but that, p. 385, if it "were to examine legislative purpose" in the case there, it would be obliged to consider not only those statements "but also the more authoritative reports" of the Senate and House committees involved. And here we are dealing, not with *a* purpose, but with the *sole* purpose, and one clearly, unequivocally, in fact, expressly, stated in such reports. The conflict here with *O'Brien* is therefore clear.

It is also clear, and it is significant, that the allowable purposes for a federal tax, contained in Art. I, Sec. 8, cl. 1, of the Constitution, and quoted in *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 313, cited by respondent in this same connection (Br. 6, fn.), do not, as respondent there seems to assume, include the mere raising of revenue without regard to the use to which the revenue raised is to be put. The question of intended use of the revenue to be raised is not avoided, therefore, by the mere absence of any indication of such

use in the taxing act. True, as held in *Cincinnati Soap Co.*, also at p. 313, this court will not concern itself with the question of such use except in "a very plain case." But that then is the standard, "plain"; and the use, the sole use, to which the revenue raised is to be put could not be plainer than it is here. This again confirms the conflict with *O'Brien* here.

3. Respondent goes so far as to charge that this suit is only "nominally" for a tax refund (Br. 7), as if petitioner had a telephone installed and paid the tax on its rental, which he was compelled to pay, not for the purpose of being able to telephone but in order to bring this suit. Petitioner is not even trying in this suit to prevent any expenditure or activity which he believes to be contrary to the Constitution; he is only objecting to being compelled, himself, to participate in such activity by sharing in its cost.

In a broad but basic sense this is the same as the First Amendment position of the appellees in *International Ass'n of Machinists v. Street*, 367 U.S. 740, and also of the appellee in *United States v. Sisson*, now pending before this court, Docket No. 305. If, as respondent contends, the legislative purpose involved here is nonjusticiable because "political" (Br. 6-7), a charge or other burden authorized by law whereby the individual is compelled to give that purpose support is barred by the First Amendment. *International Ass'n of Machinists v. Street, supra*, at pp. 746-749, 767-769. In a broad sense this issue is also presented in *United States v. Sisson, supra*, now pending here.

4. It is obvious also that the court below considered petitioner's constitutional points significant and substantial. It is clear now, too, that respondent is afraid

to give them a complete airing, even in the court below. As indicated in the petition, those points, as presented to the court below, involve the separation of powers, the law of nations, and the First Amendment.

Petitioner would not mind at all if this court required petitioner fully to brief those points, either in support of the petition or, if the writ is granted, after such grant. Unless this court indicated such desire, however, in some manner, we do not believe entitled to impose those points, the court below having expressly held it did not reach them.

5. Because of the concession of respondent quoted under paragraph 1 above on the question of standing to sue, we now ask this court to treat this reply of petitioner as being also a motion to remand to the court below for consideration by that court of the issues it failed to reach because of its conclusion that petitioner lacked standing to sue. We urge this court, in any case, not to leave the issue of standing to sue, in a suit for refund of taxes paid, in the terrible state in which it was left by the decision below.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

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PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner now petitions this Court for rehearing on his petition for writ of certiorari.

On October 13, 1969, the same date on which this Court denied certiorari herein, it also denied the motion to affirm in *United States v. Sisson,* No. 305, and ordered that case for briefing and argument. We present now in the case here two issues raised in the case there but not presented in the petition for certiorari here.

1. One of those issues is deprivation of due process under the Fifth Amendment if the defense of illegality of the act of Congress or the President involved is held nonjusticiable because it represents a "political" question. That issue is raised in *Sisson,* No. 305. (See Motion to Affirm therein, pp. 19-21.) Precisely the same issue of due process was presented herein in the

Court below, but was not presented in the petition for certiorari herein.

The political-issue doctrine, insofar as it holds nonjusticiable the *legality*, as distinguished from the *wisdom*, of the act of Congress or the President involved, clearly has no basis in the separation of powers under the Constitution. Under Article III, Section 2, Clause 1, it is provided that the judicial power extends to "*all*" cases under the Constitution. It follows necessarily that *legality* of an act of Congress or the President, and *nonjusticiability* of the question thereof, represent a direct contradiction of terms. It results that treating as nonjusticiable a question of legality is a direct denial of due process. Yet it is just that doctrine of nonjusticiability of a question of legality on which respondent heavily relies here, as it does in *Sisson*. (Brief in Opposition here, pp. 6-7.)

It is also important that that doctrine be re-examined by this Court. No department of the government, and this includes the judicial, has any authority to abdicate or to transfer to other departments the powers vested in it under the Constitution. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S. Ct. 241, 248.

2. Again, in *Sisson*, the question is raised of a breach of the free exercise clause of the First Amendment in compelling a person, in violation of his faith and conscience, to join in killing, not in defense of the homeland, but in a foreign campaign. (297 F. Supp. 902, 909-11. We have been informed that this is also shown in the jurisdictional statement in *Sisson*.) Here there is the same question in compelling a person, in violation of his faith and conscience, to join in furnishing the funds for the killing in such a campaign.

An examination of both of the above issues in the case here will be of tremendous aid to this Court in its corresponding study in *Sisson,* and with no increase in the burden upon this Court. For that reason we urge the grant of this petition for rehearing on the petition for certiorari herein. Such, it appears, was the reason for granting the petition for rehearing in *A. J. Pickett v. Union Terminal Co.,* 314 U.S. 704, 315 U.S. 386, 394. This Court could, if it desired, limit the grant to the issues presented in this petition for rehearing.

Certificate of Counsel.

This petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds stated in Rule 58, Section 2, of this Court.

GEORGE T. ALTMAN,
Attorney for Petitioner.